

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0465**

*Reversed*  
*Disqualification*

**PROCEDURAL HISTORY:** On March 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 112615). Claimant filed a timely request for hearing. On March 29, 2016, ALJ M. Davis conducted a hearing, and on April 5, 2016 issued Hearing Decision 16-UI-56503, reversing the Department's decision. On April 21, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Shiraz Grill, Inc. employed claimant as a cook from November 24, 2015 until January 15, 2016.

(2) Sometime in approximately December 2015 and early January 2016, claimant was involved in two or three verbal arguments in the workplace. The employer's owner told claimant he should not argue when he was in the workplace. After one of the arguments, claimant told the owner he was quitting. The employer's owner asked claimant to turn in his work keys and claimant refused. Claimant then told the owner he was not quitting. The owner did not take steps to discipline claimant for arguing in the workplace or refusing to surrender his keys.

(3) On January 15, 2015, claimant was working in the kitchen with the sous chef. Claimant had his cell phone out to view a non-work-related video and showed the video to the sous chef. At this time, the owner walked in to the kitchen and told claimant and the sous chef to start working. The owner was upset. Claimant also became upset and started to remove his apron as if he was going to leave the restaurant. Claimant told the owner, "I'm gone." Transcript at 34. The owner told claimant "if you take off your apron that means you're quitting" and "you do not want to work in here [anymore]." Transcript at 15, 34-35. Claimant said, "Fine" and removed the apron. Transcript at 34. The owner asked claimant to give him his work keys, and after some back-and-forth claimant did so. After this

exchange, claimant remained in the workplace and later approached the owner to continue the discussion. The owner did not allow claimant to resume working.

(4) On January 16, 2016, claimant visited the workplace, and asked to have his job back. The owner refused.

**CONCLUSIONS AND REASONS:** Claimant voluntarily left work without good cause.

In Hearing Decision 16-UI-56503, the ALJ concluded the employer discharged claimant on January 15, 2016 for taking off his apron. The ALJ further concluded that claimant was not disqualified from benefits because to the extent claimant's behavior in removing his apron was a wantonly negligent violation of the employer's standards it did not constitute unexcused misconduct. We disagree with the ALJ's characterization of the work separation, and conclude claimant was disqualified from benefits because he voluntarily left work without good cause.

The standard for determining whether a work separation is properly characterized as a discharge or a voluntary leaving is set out at OAR 471-030-0038(2) (August 3, 2011). If claimant could have continued to work for the employer for an additional period of time when the separation occurred, the separation was a voluntarily leaving. OAR 471-030-0038(2)(a). If claimant was willing to continue working for additional period of time but was not allowed to do so by the employer, the separation was a discharge. OAR 471-030-0038(2)(b).

The employer's witness, the owner, and claimant disagreed about the work separation, with claimant contending that he was discharged and the owner contending he was willing to allow claimant to continue working if claimant had not decided to quit by taking off his apron. Transcript at 5, 8, 25, 26. While both parties agreed the owner told claimant that removing his apron would signify that he was quitting work, their testimony diverged about the implications of claimant actually taking it off. Transcript at 6, 8, 15, 26-27. Claimant asserted he took off the apron, not because he intended to quit, but because the owner was "yelling" at him and he needed to leave the restaurant to take a "breather." Transcript at 6. However, the sous chef witnessed and heard the encounter between claimant and the owner and testified about it at hearing. As distinct from the parties, the sous chef was a relatively disinterested, unbiased witness and claimant considered him a personal friend. Transcript at 37. We have found facts about the conversation preceding claimant's removal of his apron based on the sous chef's testimony. Transcript at 33-40.

From the sous chef's testimony, the owner gave claimant an ultimatum about how he would construe the removal of the apron. From claimant's comments when he was taking off the apron, that he was "gone" and it was "fine" if the owner interpreted the removal as his quitting work, he was obviously and unmistakably aware that taking off the apron would be a communication that he was quitting. Notably, claimant did not contend that the owner told him he was "fired" or "terminated" or "discharged" before or after he removed the apron. By taking off his apron in these circumstances, claimant was the first party to unequivocally manifest an intention to sever the work relationship.

Claimant's behavior after he responded to the owner's ultimatum by taking off the apron appears to have been an attempt to withdraw his resignation and to restore the work relationship. However, when a claimant attempts to rescind a stated intention to leave work, the employer's refusal to allow the later

rescission does not change the separation from that of a voluntary leaving to a discharge. *See Counts v. Employment Department*, 159 Or App 22, 976 P2d 96 (1999). Regardless of whether claimant changed his mind about quitting after he removed the apron knowing the consequences of doing so, the employer was allowed to reject his attempt to withdraw this earlier communicated intention to quit and hold him to the intention he first communicated. On these facts, and for these reasons, the ALJ erred in concluding the employer discharged claimant. Claimant's work separation was a voluntarily leaving on January 15, 2015.

A claimant who leaves work voluntarily is disqualified from the receipt of benefits unless he proves, by a preponderance of the evidence, that he had good cause for leaving work when he did. ORS 657.176(2)(c); *Young v. Employment Department*, 170 Or App 752, 13 P3d 1027 (2000). "Good cause" is defined, in relevant part, as a reason of such gravity that a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, would have no reasonable alternative but to leave work. OAR 471-030-0038(4) (August 3, 2011). The standard is objective. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). A claimant who quits work must show that no reasonable and prudent person would have continued to work for his employer for an additional period of time.

As can best be discerned from the record, claimant decided to leave work because he was upset when the owner instructed him to get back to work on January 15, 2016. Assuming this reason, there was nothing in claimant's or the sous chef's account of the encounter between claimant and the owner that rose to the level of a grave reason to leave work. A relatively mild rebuke by an irritated supervisor about workplace behavior of which he disapproves is not an unprecedented event in the employment relationship, and a reasonable and prudent employee would not leave work over such a rebuke.

Claimant did not show he had good cause for leaving work when he did. Claimant is disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 16-UI-56503 is set aside, as outlined above.

Susan Rossiter and J. S. Cromwell;  
D. P. Hettle, not participating.

**DATE of Service:** May 25, 2016

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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